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November 27, 2018

SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Park Hill Request for Review and/or Waiver
Schools and Libraries Universal Service Support Mechanism,
Docket No. 02-6

Dear Ms. Dortch:

The Park Hill (Missouri) School District (Park Hill) met with representatives of the Wireline Competition Bureau (Bureau) in October,¹ regarding its pending Request for Review and/or Waiver.² The letter provides additional information for the record based on questions asked by the Bureau at that meeting.

As described in its appeal and the ex parte meeting, Park Hill conducted a competitive bidding process and determined that self-provisioning a wide area network (WAN) was the most cost-effective solution. As part of that build, Park Hill installed additional fiber strands that were not included as part of its E-rate funding request. It entered into an agreement with the City of Kansas City, Missouri, (the City) for the potential use of that fiber in exchange for Park Hill's use of city-owned conduit, saving Park Hill and the E-rate program each about \$200,000. These savings were on top of the \$200,000 to \$1.5 million Park Hill had already saved the program by selecting a self-provisioned network.

Much of the discussion at the meeting centered on whether any E-rate services were being resold by Park Hill, as alleged by USAC and prohibited by the statute and the rules. The Commission's rules state that there "is no prohibition on the resale of services that are not purchased pursuant to the discounts provided in this subpart."³ The fiber the City has access

¹ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Gina Spade, Broadband Legal Strategies, dated October 30, 2018.

² Request for Review and/or Waiver, *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Park Hill (MO) School District FCC Form 471 Application Numbers 161049598 and 171035440 (filed August 21, 2018) (Request for Review).

³ 54 C.F.R. § 54.513.

to—and has recently started using for public safety purposes—was not paid for using E-rate funds. That fiber, as noted previously, was cost-allocated out of the original funding request. During the meeting, Park Hill explained that its district WAN is completely separate from any strands of fiber that the City has access to, and the City does not have access to the district's self-provisioned network.

The E-rate program supports the special construction of facilities that will be directly used by the E-rate eligible applicant and requires cost-allocation of any incremental costs. This has been the program's practice for nearly 20 years. Neither Park Hill nor a service provider installing additional fiber during an E-rate special construction build for its own later use is "reselling" E-rate eligible services, as long as that fiber has been cost-allocated out the funding request. Park Hill installed extra strands of fiber, just as a service provider providing managed services, or leased lit or dark fiber could install extra strands of fiber for its own use. The extra fiber strands for the City's use were cost-allocated out of the E-rate funding request in the same way as extra fiber strands are cost-allocated out of any other special construction funding request.

Further, Commission rules allow an E-rate applicant to procure additional services for another public entity's use, as long as the E-rate program does not pay for those services. The Commission has specifically allowed and encouraged E-rate applicants to work with other public entities and health care non-profits to procure telecommunications, Internet access services and internal connections.⁴ It only makes sense for the other public entity that joined with the E-rate eligible entity to pay for its own services. That is what Park Hill and the City did here. In exchange for the use of the additional fiber that was installed, the City provided conduit and other services to Park Hill, saving Park Hill and the E-rate program the expense of installing those portions of conduit for the district's WAN. This is no different than if Park Hill had some file cabinets that it did not need and provided them to the City in exchange for some desks the City was not using. As specifically noted by the rules, when the E-rate program did not pay for the services, the Commission has no standing to tell an applicant or a service provider what it can and cannot do with those facilities.

Given that a service provider can install additional fiber when building new facilities for E-rate applicants, the Commission should be even less concerned about Park Hill doing so. Park Hill is not selling the fiber to a commercial entity. Park Hill is not making a profit as a service provider is allowed to do. Instead, Park Hill is sharing the benefits of its cost-savings with the E-rate program by not seeking as much funding to build its WAN.

Interestingly, in USAC's "excess fiber worksheet" for funding year 2018, USAC specifically asks applicants in question 9(a) what other entities might be using any additional fiber. USAC notes that if the service provider "*intends to use the Excess Fiber Strands to serve other customers, the answer to this question would be the name of the service provider.*" One of USAC's examples to that question seems to imply that allowing other governmental entities to use the fiber is allowed: "*If a municipality plans to use Excess Fiber Strands installed as part of a self-provisioned network to serve other community institutions, the answer to this question would be the name of the municipal entity.*" Assuming the "municipality" in the example is an

⁴ Request for Review at 11.

E-rate eligible applicant, such an example seems to indicate that what Park Hill has done—allowing another governmental entity to use additional fiber strands installed as part of a self-provisioned network—is acceptable under program rules. At the very least, the Commission should explain further what is allowed and what is not.

As Park Hill noted in its appeal, the critical test here is whether Park Hill would have known that it was not allowed to install additional fiber strands not paid for with E-rate funding for use by another public entity. As the Commission is aware, federal agencies must provide “fair notice” of their rules.⁵ If “by reviewing the *regulations and other public statements* issued by the agency,” a party acting in good faith “would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform,” the party has received fair notice.⁶

The Commission did not provide fair notice that an applicant self-provisioning its network and installing additional strands of fiber not paid for by E-rate funds for use by another public entity would lose funding for its entire project. In fact, the opposite is true:

- The Commission’s rules have allowed additional fiber to be installed, as long as those costs are removed from the funding application.
- In his public statements at a Commission-sponsored event, the Commission’s managing director encouraged such partnerships as a way to expand access to broadband.⁷
- The Commission detailed some specific restrictions on self-provisioned networks, but prohibiting the installation of additional strands of fiber was not one of them.⁸

As such, there is no reason why an applicant would have thought that existing requirements would be different for self-provisioned networks. Park Hill went above and beyond in its due diligence—and definitely acted in good faith—to determine if its project was in compliance with E-rate rules. It worked directly with USAC staff every step of the way, attended trainings, and reviewed the Commission’s orders and public statements. If the Commission now wishes to adopt different requirements for self-provisioned networks, then it should adopt those requirements in a notice-and-comment rulemaking, so that parties have fair notice of the rules.

It cannot be stressed enough that, without the City’s participation, Park Hill would have had to request additional E-rate program funds to complete its WAN, and that request would have been funded. Indeed, the Commission encouraged the type of cost-saving measures that Park Hill

⁵ See, e.g., *SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

⁶ *Trinity*, 211 F.3d at 628 (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)) (emphasis added).

⁷ Park Hill Request for Review at 16.

⁸ Park Hill Request for Review at 14.

undertook here; if the applicant's costs are lower, so are the program's disbursements. And most importantly, of course, the fiber was not purchased with E-rate funds to begin with.

For all the reasons above, as well as those in its appeal, the Commission should grant Park Hill's request for review.

An electronic copy of this letter is being filed for inclusion in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Gina Spade

Gina Spade
Counsel for Park Hill School District

cc: D'wana Terry (via email)
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